No. 87-784

In the Supreme Court of the United States

OCTOBER TERM, 1987

WAYNE PORTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioners Bell, Jolly, Barrentine, and Hand a severance from petitioner Porter.

2. Whether the district court properly admitted evidence that Porter became a fugitive after he learned that he was under indictment for federal drug offenses in Florida.

3. Whether the government could use Porter's guilty plea to the Florida indictment as part of the proof of the "series" element of a continuing criminal enterprise offense under 21 U.S.C. 848.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and rules:

Statutes and rules – Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-784

WAYNE PORTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 821 F.2d 968.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1987. A petition for rehearing was denied on August 26, 1987 (Pet. App. B1). The petition for a writ of certiorari was filed on November 9, 1987, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of North Carolina, petitioner Porter was convicted on five counts of conspiracy to possess a controlled substance with intent to distribute it, in viola-

tion of 21 U.S.C. 846 (Counts 1, 16, 18, 19, 24); two counts of possessing a controlled substance with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 2, 4); one count of distributing a controlled substance, in violation of 21 U.S.C. 841(a)(1) (Count 7); three counts of interstate transportation to promote an illegal activity, in violation of 18 U.S.C. 1952 (Counts 8, 17, 25); four counts of using a communications facility to facilitate a felony drug offense, in violation of 21 U.S.C. 843(b) (Counts 26-29); and one count of conducting a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 (Count 34). The other petitioners each were convicted on Counts 1, 2, 4 and 7.[1]

Petitioner Porter was sentenced to 75 years' imprisonment, and the other petitioners each were sentenced to 15 years' imprisonment. In addition, Porter and Jolly received four-year special parole terms, while Bell, Barrentine and Hand received two-year special parole terms.

The court of appeals reversed Porter's convictions on Counts 16, 17, 25, 27 and 28 because of evidentiary insufficiency (Pet. App. A9-A10). In addition, it set aside his sentences for conspiracy on Counts 1, 18, 19 and 24 on the ground that Congress did not intend to impose punishment for both conspiracy and a continuing criminal enterprise offense (*id.* at A15).[2] In all other respects, the court of appeals affirmed.

---

[1] Although the petition refers to all the defendants below as petitioners (Pet. i, 1), counsel for petitioner Porter has stated that he represents only Porter, and that this petition seeks review only as to Porter. Bell and Jolly have filed a separate petition of their own (No. 87-1334).

[2] Because the sentences on the conspiracy convictions had been ordered to run concurrently with Porter's 75-year sentence on the CCE count, the vacation of the conspiracy sentences did not affect the length of Porter's prison sentence.

1. The evidence at trial established that Porter headed and the other petitioners assisted in a drug importation and distribution operation. In November 1980, the enterprise imported 30,000 to 40,000 pounds of marijuana and a large quantity of quaaludes by sea, by smuggling it on board a boat called the "Frances Louise."[3] In September 1981, Porter's organization attempted to unload 30,000 pounds of marijuana and 20 kilograms of cocaine at Brunswick, Georgia, but the operation failed when the vessel carrying the drugs was seized. In early 1982, Porter planned to bring 10,000 to 15,000 pounds of marijuana into Wilkes County, North Carolina, aboard an airplane. Although Porter assembled off-loaders at the Wilkes County airfield, the plane never arrived.

In May 1982, Porter received a radio call from one of his Colombian suppliers, David Garcia, informing him that a disabled ship laden with drugs was drifting off the coast of the Carolinas. Porter secured boats to assist unloading the disabled ship, but radio problems delayed him so that Garcia had to find another buyer. Shortly thereafter, Porter tried to bring in a load of marijuana aboard another ship, the "Sea Wife." He obtained the ship and had his personnel ready to off-load the cargo, but the Coast Guard seized the ship while it was at sea. The Porter enterprise dissolved in the summer of 1982 when a government "sting" operation resulted in the arrest of two of Porter's workers and the seizure of $489,000 of Porter's money. Porter was a fugitive from July 1982 until November 1983.

The other petitioners assisted Porter in the "Frances Louise" operation. Bell took part in the planning and financing of the operation and helped in arranging the

---

[3] This account of the evidence is taken from the government's brief in the court of appeals. The facts are not in dispute.

sale of the drugs. Jolly's role was to maintain contact with the suppliers in Colombia; near the end of the operation, he tried to help the Colombian suppliers obtain payment for the drugs. Barrentine purchased the "Frances Louise" for use as a drug vessel, assisted in preparing it for the job, went out to meet the mother ship to obtain the drugs, and helped in off-loading drugs in Jacksonville, Florida. Hand was present at the off-loading site and led a drug-laden tractor trailer to his farm, where the contraband was kept until it could be transported to North Carolina.

2. The court of appeals rejected the misjoinder and severance arguments made by petitioners Hand, Barrentine, Jolly, and Bell. The court found (Pet. App. A4) that all five petitioners were properly joined under Fed. R. Crim. P. 8(b), since "the indictment charged Porter with engaging in a continuing enterprise based on a series of crimes, including those involving the other [petitioners] * * *." The court also concluded (Pet. App. A4) that Hand, Barrentine, Jolly, and Bell were not entitled to a severance from Porter under Fed. R. Crim. P. 14, because they had shown no prejudice from the joint trial.

The court of appeals also rejected petitioner Porter's argument that the district court erred by admitting evidence that Porter became a fugitive after a Drug Enforcement Administration (DEA) agent told him that he had been indicted for drug offenses in the Middle District of Florida. The court of appeals observed (Pet. App. A11) that the drug offenses charged in the Florida indictment were part of the overall narcotics operation that the government alleged in the CCE charge; that "Porter knew he had illegally imported and possessed drugs on many occasions"; and that Porter "did not know * * * precisely which violations were the subject of the prosecution in Florida." Under those circumstances, the court of appeals

concluded (*id.* at A12) that "[t]he jury reasonably could find that [Porter] became a fugitive to escape any prosecution for his numerous violations of the drug laws which ultimately led to his present indictment for engaging in a continuing criminal enterprise."

Finally, the court of appeals rejected Porter's challenge to the CCE charge. It held (Pet. App. A14) that evidence of two drug transactions that took place before the period alleged in the indictment was properly admitted under Fed. R. Evid. 404(b), and that evidence of Porter's guilty plea conviction in Florida, which related to events that continued past the period referred to in the indictment, was properly admitted for the purpose of meeting the "series" element of CCE, see 21 U.S.C. 848(b)(2).[4] The court reasoned that although the offenses underlying the Florida convictions extended one month beyond the period referred to in the indictment, the variance was slight, and Porter was put on notice by the bill of particulars that the government would use the Florida offense to prove the CCE charge. The court of appeals observed (Pet. App. A15) that, in any event, Porter's convictions on Counts 2, 4, 7, 8, 26 and 29 "more than sufficed to meet the § 848(b)(2) series" requirement.

Judge Winter dissented. In his view, Hand, Barrentine, Jolly and Bell should have been granted a severance from Porter (Pet. App. A17-A18), and the evidence of Porter's flight should have been excluded under applicable Fourth Circuit precedent (*id.* at A16-A17).

---

[4] Under Section 848(b), a person is engaged in a continuing criminal enterprise if he commits a felony drug violation that is part of a series of such violations undertaken in concert with five or more persons, with respect to whom he "occupies a position of organizer, a supervisory position, or any other position of management" and from which he "obtains substantial income or resources."

ARGUMENT

1. Petitioners Bell, Jolly, Barrentine, and Hand contend (Pet. 4-5) that they were entitled to a severance from petitioner Porter.[5] To the extent that their argument is based on a claim of misjoinder, it is clearly without merit. Rule 8(b) of the Federal Rules of Criminal Procedure permits the joinder of defendants if "they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." And, under the rule, "all of the defendants need not be charged in each count." The courts construing Rule 8(b) have held that separate acts that constitute separate offenses are sufficiently related to be within the "same series" if they arise out of a common plan or scheme. See *United States* v. *Guerrero*, 756 F.2d 1342, 1345 (9th Cir.), cert. denied, 469 U.S. 934 (1984). Here, as the court of appeals explained (Pet. App. A4), "[a]ll [the petitioners] were alleged to have participated in a drug importation and distribution scheme run by Porter," and Porter was charged with conducting a continuing criminal enterprise that included the incident in which the other petitioners participated.

Nor were Bell, Jolly, Barrentine, and Hand entitled to a severance under Fed. R. Crim. P. 14. To establish an improper denial of a severance, a defendant must bear the heavy burden of demonstrating clear prejudice, and he may obtain reversal only if the denial of a severance was an abuse of discretion. See *United States* v. *Kabbaby*, 672 F.2d 857, 861-862 (11th Cir. 1982). Petitioners argue (Pet. 4) that they were entitled to be tried separately from Porter because of the danger of evidentiary "spillover"—the risk

---

[5] As we noted (see note 1, *supra*), this petition is on behalf of Porter alone. Thus, in addition to their lack of merit, the arguments as to the other petitioners have no bearing on Porter's application for review.

that the jury's perception of Porter's guilt would affect its judgment as to them. There was no such danger: the evidence against Bell, Jolly, Barrentine, and Hand, which related solely to the "Frances Louise" operation, was readily segregable from the evidence of Porter's other drug ventures, so that the jury easily could understand which evidence applied solely to Porter and which to all the defendants. Moreover, the district court repeatedly instructed the jury as to what testimony was to be considered against particular defendants (Pet. App. A4), and the jury evidently understood its responsibility to consider the evidence against each defendant separately, since it acquitted certain defendants on some counts. " 'Convictions will invariably be sustained if it may be inferred from the verdict that the jury 'meticulously sifted the evidence,' as where it acquits on certain counts.' " *United States* v. *Kabbaby*, 672 F.2d at 861 ([redacted])

2. At trial, a DEA agent testified that on July 22, 1982, while he was executing a search warrant at Porter's residence in Charlotte, North Carolina, he answered a telephone call that proved to be from Porter, who was in Tennessee (Pet. App. A10). The agent told Porter that a federal grand jury in Florida had indicted him for drug importation and possession and that he had a warrant for Porter's arrest. After the agent advised Porter to turn himself in, Porter hung up. Porter remained a fugitive until November 1983, when he surrendered to the authorities. He ultimately pleaded guilty to the Florida drug charges. *Ibid.*

In the charge to the jury in this case, the district court stated that, if the jury believed the agent's testimony, it could consider the fact that Porter did not turn himself in

after being told of the arrest warrant as evidence that he knew he was guilty of the crimes charged in this prosecution (Pet. App. A11). Porter contends (Pet. 3-4) that the evidence of his flight should not have been admitted because, at most, it revealed that he knew that he had committed the crimes charged in the Middle District of Florida, but not that he knew he had committed the crimes charged in this case.

Porter's Florida crimes, however, were specifically alleged to be part of the criminal enterprise that the CCE count in this case accused him of conducting (Pet. App. A10). Thus, this case involves an application of the settled principle that " 'flight' is generally admissible as evidence of guilt, and that juries are given the power to determine 'how much weight should be given to such evidence.' " *United States* v. *Touchstone*, 726 F.2d 1116, 1119 (6th Cir. 1984) (quoting *United States* v. *Craig*, 522 F.2d 29, 32 (6th Cir. 1975)); see also *United States* v. *Schepp*, 746 F.2d 406, 409 (8th Cir. 1984), cert. denied, 469 U.S. 1215 (1985); *United States* v. *Tille*, 729 F.2d 615, 622 (9th Cir.), cert. denied, 469 U.S. 845 (1984). An inference of consciousness of guilt would, of course, be unfounded "where a defendant flees after 'commencement of an investigation' unrelated to the crime charged, or of which the defendant was unaware" (*United States* v. *Beahm*, 664 F.2d 414, 419-420 (4th Cir. 1981) (citation omitted)). In this case, however, the evidence of Porter's guilt of the Florida crimes was also evidence of his guilt of the CCE count. As the court of appeals concluded (Pet. App. A11-A12), although Porter "did not know * * * precisely which violations were the subject of the prosecution in Florida," the jury "reasonably could find that he became a fugitive to escape any prosecution for his numerous violations of the

drug laws which ultimately led to his present indictment for engaging in a continuing criminal enterprise."[6]

3. Relying on *Garrett* v. *United States*, 471 U.S. 773 (1985), Porter contends (Pet. 5) that the government's use of his Florida guilty plea to meet the "series" requirement of the CCE statute violated the Double Jeopardy Clause. He acknowledges (*ibid.*) that in *Garrett* the Court held that a previous conviction "may be used to show one of the predicate offenses required under CCE." But he argues (*ibid.*) that *Garrett* foreclosed the use of the Florida guilty plea to support the CCE charge because his Florida crimes and his criminal enterprise constituted "a single course of conduct"—that is, because the Florida crimes were a lesser included offense within the CCE charge.

Although the Court in *Garrett* did not decide the issue, it expressed "serious doubts" that the predicate offense at issue in that case was a lesser included offense within the CCE charge. 471 U.S. at 790. The Court noted (*id.* at 788-789) that the various smuggling operations in *Garrett* were wholly separate from one another, and that at the time Garrett committed the first of the three predicate

---

[6] Porter's suggestion (Pet. 3) that the decision in this case conflicts with other Fourth Circuit decisions was rejected below; in any event, an intracircuit conflict does not call for review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Neither of the cases he cites from other circuits (Pet. 4) states a principle inconsistent with the Fourth Circuit's approach here, and neither involves the inference to be drawn from flight caused by charges concerning one part of a continuing criminal enterprise. Moreover, the cases on which Porter relies recognize that the admissibility of flight evidence depends on the particular facts of each case. See *United States* v. *Myers*, 550 F.2d 1036, 1049-1050 (5th Cir.) (evidence left doubts as to whether defendant had actually fled), cert. denied, 439 U.S. 847 (1977); *United States* v. *Jackson*, 572 F.2d 636, 640 (7th Cir. 1978) ("great significance" placed on "proximity in time of the flight to the crime charged").

offenses required to form the basis for a CCE prosecution, "it could not * * * have been said with any certainty that he would necessarily go ahead and commit the other violations required to render him liable on a CCE charge." The Court cautioned (*id.* at 789) that the notion of a single course of conduct comprising a lesser included offense within a greater offense is not readily transposed to such "multilayered conduct, both as to time and to place * * *."

The "lesser included offense" principles of double jeopardy are no more applicable here than they were in *Garrett*. As in *Garrett*, the various smuggling offenses at issue in this case constituted wholly separate operations, and Porter's importation of marijuana and quaaludes aboard the "Frances Louise" in November 1980 did not lead to the Florida offenses committed in the summer of 1982 any more than Garrett's first predicate offense led to his later ones. Indeed, several of Porter's importation operations were charged in the indictment as separate conspiracies, and Porter was convicted on four separate conspiracy counts. In short, far from supporting Porter's claim that his smuggling operations constituted a single course of conduct, *Garrett* undercuts it.[7]

In support of his double jeopardy claim, Porter points to the prosecutor's explanation in the district court that the Florida crimes, although they extended slightly beyond the

---

[7] The pre-*Garrett* decision in *United States* v. *Lurz*, 666 F.2d 69 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982), does not support Porter's position. In *Lurz*, the Court construed CCE to be a compound form of the principal felony, and it therefore held that a defendant could not be successively prosecuted for that felony and CCE. At the same time, however, the court ruled that previously prosecuted offenses could be used to prove the remaining elements of CCE, including the continuing series of violations (other than the principal felony). 666 F.2d at 75-77. In any event, as a Fourth Circuit decision, *Lurz* does not create an inter-circuit conflict with the decision in this case.

time period ascribed by the indictment to the criminal enterprise, were fairly covered by the indictment, since they were committed as part of the activities of the enterprise (Pet. 5). But that is not enough to render the Florida crimes lesser included offenses of the CCE violation. Saying that a predicate offense is part of a series of offenses for purposes of a CCE charge is quite different from saying that a predicate felony and the CCE violation constitute the same offense under the Double Jeopardy Clause. See *Garrett*, 471 U.S. at 786.

In any event, even without the evidence of the Florida guilty plea, "Porter's convictions on counts 2, 4, 7, 8, 26, and 29 more than sufficed to meet the § 848(b)(2) series element" (Pet. App. A15). Therefore, even if it was improper to include proof of the Florida guilty plea, the CCE conviction would not be affected, since the convictions on the other counts show that the jury found petitioner to have been involved in each of those predicate offenses.[8]

---

[8] In passing, Porter renews (Pet. 5) his challenge to the evidence of two smuggling operations that occurred shortly before the period that the indictment alleged the criminal enterprise covered. The court of appeals held (Pet. App. A14) that the evidence was properly admitted under Fed. R. Evid. 404(b) because it was relevant to prove petitioner's state of mind. That determination does not warrant this Court's review, and in any event that evidence could have been admitted to help establish the "series" element of the CCE count (Pet. App. A15).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

FEBRUARY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60298